

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA,)	CRIM. ACTION NO. 3:04CV00023-001
)	
v.)	
)	<u>ORDER</u>
COLIN F. GORDON,)	
)	
Defendants.)	JUDGE JAMES H. MICHAEL, JR.

Before the court are defendant Colin Gordon's Motion to Suppress Evidence and his Motion to Exclude Evidence Regarding his Status as an Illegal Alien, both filed on August 20, 2004. A hearing on the motions was held on August 30, 2004. For the reasons stated in open court and the reasons stated below, both motions are denied.

In his motion to suppress, Colin Gordon claims that his arrest by officers of the Jefferson Area Drug Enforcement (JADE) task force, as well as their search of his person and of Room 207 at the Red Carpet Inn in Albemarle County, violated the Fourth Amendment of the United States Constitution (as applied to the states through the Fourteenth Amendment), which protects persons from unreasonable searches and seizures. The defendant argues that his arrest was not supported by a warrant, probable cause, or consent. He further argues that the search warrant obtained by the police to search Room 207 was issued without probable cause that evidence of a crime would be found at that location, and that the search of Room 207 was not supported by a valid warrant, probable cause, or consent.

The government's evidence in support of the arrest and searches in question consists primarily of the testimony at the August 30, 2004 hearing of Detective John McKay of the Albemarle County Police Department and the search warrant application submitted by Detective G.Q. Fields on January 21, 2004. For the reasons explained by the court during the August 30, 2004 hearing, this evidence – including JADE's prior investigation of the

defendant as well as his actions on January 20-21, 2004 – clearly shows that there was probable cause to arrest and search Colin Gordon and to issue a warrant to search Room 207 of the Red Carpet Inn.

In his second motion, defendant Colin Gordon seeks to exclude any evidence of his illegal alien status. The defendant is specifically concerned with Count Four, which charges him with possessing a firearm while being an illegal alien, in violation of 18 U.S.C. § 922(g)(5). Because he has pled guilty to Count Five of the superseding indictment, which charges him with illegally re-entering the United States after a previous deportation, and because he admits that he is an illegal alien, he argues that the only question for the jury is whether he possessed a firearm.¹ He therefore asks that any evidence regarding his illegal status be excluded under Federal Rule of Evidence 403, because it would have no probative value and would only prejudice the defendant. The defendant apparently seeks to deny the jury any knowledge of his illegal status, even including the fact of his stipulation.

Most of the case law in this area focuses on the “felon in possession” provision, 18 U.S.C. § 922(g)(1), case law which the court finds applicable to the similar provision barring illegal aliens from possessing firearms, 18 U.S.C. § 922(g)(5). At least one district court decided to exclude any mention of a stipulated prior conviction in its jury instruction on § 922(g)(1). *Unites States v. Orena*, 811 F. Supp. 819, 827 (E.D.N.Y. 1992). In that case, the court instructed the jury that the parties had agreed that mere possession was criminal in the circumstances of that case, and that the jury must find the defendant guilty of the firearm offense if it found that the defendant possessed the weapon. *Id.* at 827-28. Thus, the jury in that case had no knowledge of the defendant’s prior conviction, let alone the details of the conviction.

The Supreme Court has ruled that once a defendant has stipulated to a prior felony

¹ Count Four also charges Colin Gordon with being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) . His motion to exclude states that he has stipulated to his prior felony conviction. The motion, however, does not request that evidence of the prior felony conviction be excluded.

conviction, the government may not introduce evidence regarding the nature of the prior felony. *Old Chief v. United States*, 519 U.S. 172 (1997). However, the Supreme Court's decision in *Old Chief* does not require courts to exclude evidence of the bare fact of the prior conviction (or by implication, of illegal status); it only barred evidence of the *nature* of a prior conviction to which the defendant has stipulated. The Court stated, "The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the jury instructions." *Old Chief*, 519 U.S. at 191-92. Moreover, the Fourth Circuit has rejected the idea that the jury should not be informed of an element of a crime (and specifically § 922(g)) to which the defendant has stipulated. See *United States v. Milton*, 52 F.3d 78, 80-81 (4th Cir. 1995); *United States v. Muse*, 83 F.3d 672, 679 (4th Cir. 1996). Consistent with the Supreme Court and the Fourth Circuit, this court finds that the jury must be informed of every element of a § 922(g) offense of which it is convicting a defendant; if the defendant stipulates to a "status" element such as a prior conviction or illegal alien status, the stipulation is admissible, but any additional evidence regarding prior convictions or illegal status to which the defendant has stipulated should be excluded.

Therefore, it is this day

ADJUDGED, ORDERED, AND DECREED

as follows:

1. Defendant Colin Gordon's Motion to Suppress Evidence is DENIED.
2. Defendant Colin Gordon's Motion to Exclude Evidence Regarding his Status as an Illegal Alien is DENIED; and
3. If the jury is made aware of defendant Colin Gordon's prior convictions and illegal status through the defendant's own admission or stipulation, no further evidence regarding

the nature or details of defendant Colin Gordon's prior convictions or his illegal status will be admitted.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record and to the defendant.

ENTERED: _____
Senior United States District Judge

Date